**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Consumer Protection in the Broadband Era | ) | WC Docket No. 05-271 |
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# REPLY COMMENTS OF AT&T INC.

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March 1, 2006

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## I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliates (collectively, AT&T) respectfully submit the following reply comments in response to the above-captioned notice of proposed rulemaking regarding consumer protection in the broadband era.[1] In its opening comments, AT&T encouraged the Commission to be mindful of Congress's preference for a deregulated broadband marketplace, and we urged the Commission not to impose consumer protection regulations on broadband services unless it first identifies a clear and present market failure that requires action by this Commission. We also cautioned the Commission to be wary of commenters advocating for additional broadband regulation based solely on speculation about consumer harms that *may* happen in the future or *could* occur at some later date.[2]

As expected, several commenters have indeed called for heavier regulation of broadband Internet access service without making any attempt to identify market failures that would justify such regulation. NARUC, for example, sets forth a regulatory framework that it believes the Commission should adopt "*assuming* the FCC finds there is a market failure."[3] But as numerous other commenters have pointed out, imposing regulation in the absence of any demonstrated market failure would needlessly raise the cost of providing broadband service in a market where competitive forces already demand that providers adopt pro-consumer policies and practices.[4] Indeed, Chairman Martin himself has expressed these very same sentiments: "the Commission

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[1] *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Notice of Proposed Rulemaking, FCC 05-150 (released Sept. 23, 2005) (*Consumer Broadband Notice*). On November 18, 2005, SBC Communications Inc. closed on its merger with AT&T Corp. The resulting company is now known as AT&T Inc. In these comments, "AT&T" refers to the merged company, including its ILEC operating subsidiaries, unless otherwise noted.

[2] AT&T Comments at 5.

[3] NARUC Comments at 11 (emphasis added).

[4] *See* BellSouth Comments at 5-8; CTIA Comments at 9-10; Comcast Comments at 19; NCTA Comments at 11-15; Time Warner Comments at 4-5; USTelecom Comments at 4-7.

shouldn't be adopting regulations in anticipation of problems that we haven't seen materialize . . . ."[5]

In the discussion that follows, we respond to each of the relevant consumer protection issues raised in the comments. Given the Congressional preference for deregulation and the absence of any clear and present market failures, we explain that, with one limited exception for streamlined discontinuance procedures, there is generally no need for this Commission to adopt new consumer protection regulations for the provision of broadband Internet access service.

## II. DISCUSSION

### A. Slamming

In a classic case of attempting to solve problems that do not exist, several commenters urge the Commission to impose its slamming rules on the provision of broadband Internet access service.[6] For example, NASUCA claims that "slamming poses the same threat in the context of broadband services that it poses in the context of traditional telephone service."[7] NARUC similarly asserts that "the Internet environment may, in fact, prove to be more hospitable to slamming than traditional telephony services."[8] Yet neither NASUCA, NARUC, nor any other commenter in this proceeding has offered the slightest bit of evidence that such slamming has actually ever occurred, let alone at a frequency that would warrant the Commission imposing burdensome and costly slamming rules on broadband services.

[5] *At FCC, Broadband Access is Chief Issue*, LA Times (Dec. 19, 2005).

[6] AARP Comments at 4-5; NARUC Comments at 12; NASUCA Comments at 31, 35; New Jersey Ratepayer Advocate Comments at 11; 3PV Comments at 10-12.

[7] NASUCA Comments at 31.

[8] NARUC Comments at 12.

By contrast, numerous commenters have provided detailed explanations of the technical and practical impediments to broadband slamming.[9] Indeed, Time Warner states that "AOL is not aware of *any* of its millions of customers having been slammed by a competing ISP."[10] Under these circumstances, there is simply no rational basis for the Commission to impose slamming rules on broadband services.

### B. Truth-in-Billing

A handful of commenters ask the Commission to impose truth-in-billing (TIB) rules on providers of broadband Internet access service.[11] Yet most of these commenters fail to offer any evidence that broadband consumers are not receiving adequate billing information today or that the marketplace is otherwise failing broadband consumers with regard to billing. For example, AARP and the New Jersey Ratepayer Advocate simply urge the Commission to adopt TIB rules for broadband Internet access service without making any independent effort to explain how consumers are purportedly being harmed by the existing billing practices of broadband providers.[12] NARUC similarly fails to provide any evidence of a market failure and concedes that it "has no [TIB] resolutions that specifically address wireline DSL service."[13]

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[9] AT&T Comments at 7-8; BellSouth Comment at 10-13; Comcast Comments at 15; Verizon Comments at 14.

[10] Time Warner Comments at 9 (emphasis in original).

[11] *See* AARP Comments at 4; NARUC Comments at 13; New Jersey Ratepayer Advocate Comments at 11.

[12] The New Jersey Ratepayer Advocate quotes a passage from the *Consumer Broadband Notice*, where the Commission claims to have received consumer complaints about billing practices for broadband Internet access service. New Jersey Ratepayer Advocate Comments at 11 (quoting *Consumer Broadband Notice* ¶ 153). The Commission asserts that it obtained this complaint data from its Operations Support for Complaint Analysis and Resolution (OSCAR) System. *Consumer Broadband Notice* ¶ 153 n.459. However, the Commission did not specify the number of complaints it received or the timeframe during which they were received, nor did it make this data publicly available, thus preventing interested parties from commenting on the significance of this purported complaint data.

[13] NARUC Comments at 14.

The only commenter to provide "evidence" of a potential concern regarding broadband billing practices is the Ohio Commission, which claims that its call center received over 450 DSL-related consumer "contacts" from January 1, 2005, through October 1, 2005, with "the majority concerning marketing and billing practices."[14] Even assuming that each of these "contacts" concerned billing issues and rose to the level of an actual complaint (as opposed to merely a question), the number of contacts is still quite low when compared to the overall number of DSL customers in Ohio. Indeed, this Commission's broadband data show that there are more than 455,000 DSL subscribers in Ohio, resulting in less than one "contact" per thousand DSL customers.[15]

Given the meager "evidence" of broadband billing concerns in the record, it appears that market forces are sufficient to encourage broadband providers to adopt consumer-friendly billing practices. Accordingly, the Commission should not expend its limited resources creating TIB rules for broadband Internet access services when there is no record of a marketplace failure.

### C. Customer Proprietary Network Information

Only three commenters ask the Commission to impose CPNI-like requirements on providers of broadband Internet access service: AARP, the New Jersey Ratepayer Advocate, and NASUCA.[16] As with other issues raised in the *Consumer Broadband Notice*, however, these commenters do not offer any actual evidence of CPNI-related failures in the broadband

[14] Ohio Commission Comments at 11.

[15] *High-Speed Services for Internet Access: Status as of December 31, 2004*, Wireline Competition Bureau, FCC, at Table 7 (July 2005).

[16] NARUC posits that the application of CPNI rules to broadband Internet access service would be consistent with its existing policies, but acknowledges that it "has nowhere spoken specifically to this issue." NARUC Comments at 11. VeriSign urges the Commission to address the "secure availability and interoperability of authoritative CPNI directory information," but does not advocate for the imposition of specific CPNI-like consumer protection rules. VeriSign Comment at 2.

marketplace that warrant Commission intervention. Neither AARP nor the New Jersey Ratepayer Advocate even suggest that such failures have actually happened. And while NASUCA alleges that such market failures "have already occurred," the purported evidence cited by NASUCA fails to support its allegations.[17]

NASUCA claims that, while many broadband Internet access providers have privacy policies, consumers are nonetheless forced to accept "unilateral" and "unknown" changes in those policies.[18] In support of this argument, NASUCA cites the web address of the privacy policy applicable to SBC Yahoo! DSL service, and offers selected quotes from that privacy policy.[19] Ironically, by citing the web address of this privacy policy, NASUCA has unwittingly demonstrated that consumers are *not* "unilaterally" forced to accept any particular privacy policy. Indeed, it is precisely because SBC (now AT&T) and many other broadband Internet access providers post their privacy policies online that consumers can choose a provider with a privacy policy that best meets their needs. In addition, as NASUCA's own citation to the SBC Yahoo! privacy policy makes clear, consumers are not forced to accept "unknown" changes to that privacy policy because SBC expressly notifies customers of changes in the policy. Specifically, the portion of the privacy policy quoted by NASUCA states that "[SBC] may amend this Privacy Policy from time to time. If we make any substantial changes in the way we use your personal information we will notify you by posting a prominent announcement on our pages. Please also check periodically for any changes to our Privacy Policy."[20] Thus, rather

[17] NASUCA Comments at 25.

[18] NASUCA Comments at 24.

[19] NASUCA Comments at 24 n.61.

[20] NASUCA Comments at 24 n.61.

than providing any support for NASUCA's arguments, the SBC Yahoo! privacy policy directly undermines those arguments.

Undaunted in the face of this self-contradiction, NASUCA goes on to cite two additional pieces of "evidence" demonstrating an alleged privacy-related market failure: an April 2004 press release from a group of privacy organizations and a March 2002 article from the CNET news service.[21] But again, NASUCA's own evidence undermines its arguments. Rather than offering examples of actual privacy problems, NASUCA itself characterizes the press release as raising "concerns over *potential* privacy abuses."[22] As Chairman Martin has pointed out, however, "there's a significant difference between potential problems and problems that occur."[23] If there "hasn't been significant evidence of a problem," then the Commission should be "hesitant to adopt rules."[24]

NASUCA's citation to the CNET article, which discusses concerns over the storage of web users' data, is similarly unavailing. NASUCA neglects to mention that the service provider at issue in that article promised to immediately "stop storing this individual customer information in order to completely reassure our customers that the privacy of their information is secure."[25]

Perhaps recognizing the paucity of its own "evidence" of a market failure, NASUCA goes on to argue that extending the Commission's CPNI rules to broadband Internet access

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[21] NASUCA Comments at 25 n.63.

[22] NASUCA Comments at 25 n.63 (emphasis added) (citing *Thirty-One Privacy and Civil Liberties Organizations Urge Google to Suspend Gmail*, Privacy Rights Clearinghouse Press Release (April 19, 2004)).

[23] *No action needed now on Net neutrality – FCC chief*, Reuters (Dec. 24, 2005).

[24] *Id.*

[25] *Comcast privacy move its latest woe*, CNET News.com (March 31, 2002).

service is warranted "[e]ven without a concrete and substantial record of privacy abuses."[26] But creating new regulations merely to address *potential* problems, as NASUCA advocates, would lead to precisely the type of knee-jerk application of legacy regulations to competitive broadband services that Congress sought to avoid when it wrote the 1996 Act. As Congress made clear in section 230 of the Act, it is the policy of the United States to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[27]

Although the record in this proceeding fails to support imposing CPNI-like regulations on broadband Internet access service, AT&T is certainly mindful of the issues that have been raised regarding the privacy and security of CPNI related to traditional telephone service and we intend to participate in the Commission's examination of those issues.[28] At the same time, however, the Commission must recognize that concerns about the disclosure of calling records related to *telephone service* are not present with respect to *broadband Internet access service*.

Because many telephone service offerings have historically been billed on a per minute basis, carriers enable customers to review and inspect the calling records that underlie their telephone bills. In some cases, unscrupulous third parties have taken advantage of this fact and, through deceptive means, have wrongfully gained access to the calling records of some

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[26] NASUCA Comments at 25.

[27] 47 U.S.C. § 230(b)(2) (emphasis added).

[28] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 06-10 (released Feb. 14, 2006) (*CPNI Notice*). AT&T expects that some reply commenters in the instant docket will argue that the Commission's recent Notice of Apparent Liability (NAL) against AT&T for failing to produce an annual CPNI certificate for 2005 is evidence of a market failure that should prompt the Commission to adopt CPNI-like rules for broadband Internet access service. *See AT&T Inc.*, File No. EB-06-T-059, Notice of Apparent Liability for Forfeiture, DA 06-221 (released Jan. 30, 2006). While AT&T takes the NAL very seriously, AT&T wishes to emphasize that the NAL was issued for an apparent record-keeping violation, not a customer-impacting CPNI matter.

telephone service customers.[29] The deceptive practice that has caused perhaps the greatest concern in this area is "pretexting." Through pretexting, these third parties falsely assume the identity of the customer, often by calling a carrier's customer service representative, impersonating the customer, and deceiving the customer service representative into disclosing the customer's calling records.[30]

By contrast, broadband Internet access does not present the same pretexting opportunities as telephone service. Broadband Internet access service is typically billed based on the broadband capacity offered to the customer (e.g., $15 per month for 1.5 Mbps DSL service). Consequently, "calling records" are not necessary to bill customers for broadband Internet access service, thus obviating both the need to make such records available to customers and the ability of pretexters to improperly access those records by deceiving customer service representatives. Accordingly, while pretexting concerns may exist about the privacy of calling records for traditional telephone service, those same concerns are simply not present regarding broadband Internet access service and the Commission should not reflexively apply CPNI-like regulations to broadband service providers.

Nonetheless, as AT&T and other commenters explained in their opening comments, to the extent the Commission finds it necessary to impose CPNI-like rules on providers of broadband Internet access service, it should do so in a consistent and competitively neutral manner for *all* providers of broadband Internet-based services and applications.[31] The Commission should therefore reject NCTA's argument that cable broadband providers should be

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[29] *See CPNI Notice* ¶¶ 10-11.

[30] *See EPIC: Lawyers Drive Phone Data Black Market*, Internetnews.com (Feb. 24, 2006); *Selling phone records*, Niles Daily Star Online Edition (Feb. 3, 2006).

[31] *See* AT&T Comments at 13-14. *See also* BellSouth Comments at 17-18.

exempted from any new CPNI-like rules for broadband and should instead be subject solely to the cable privacy provisions of section 631 of the Act.[32] Creating a special carve-out for cable modem service from any new CPNI-like rules would serve no purpose other than to distort the competitive marketplace and confuse consumers. Thus, if the Commission does create new CPNI-like rules, it should apply them evenhandedly to cable modem service providers as well as providers of other broadband Internet services and applications.[33]

### D. Section 254(g) Rate Averaging and Rate Integration

The States of Alaska and Hawaii both urge the Commission to apply the rate averaging and rate integration requirements of section 254(g) to broadband Internet access services. Alaska asserts that the "principles of geographic rate averaging and rate integration . . . should *remain* a fundamental part of the Commission's policy and be applicable, in an appropriate manner, to broadband Internet access service."[34] Hawaii argues that "[i]t would seriously undermine the underlying policies of Section 254(g) if broadband service providers were able to *evade* the geographic averaging and rate integration requirements . . . ."[35]

Both of these arguments appear to erroneously imply that the policies and requirements for rate averaging and rate integration already apply to broadband Internet access service. But as AT&T explained in its opening comments, Congress expressly limited the rate averaging and rate integration provisions of section 254(g) to "interexchange telecommunications services."[36]

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[32] NCTA Comments at 5-7.

[33] *See* AT&T Comments at 13-14 (explaining that there are a wide variety of service and application providers in the broadband marketplace that handle potentially sensitive consumer information, including providers of online search engines, VoIP services, and Internet music and video applications).

[34] Alaska Comments at 4 (emphasis added).

[35] Hawaii Comments at 3 (emphasis added).

[36] AT&T Comments at 14-18.

Imposing these requirements on broadband Internet access service, which is an information service, would be beyond the scope of section 254(g) and would directly undermine this Commission's long-standing policy *not* to saddle providers of information services with burdensome, market-distorting economic regulations.[37] Moreover, any attempt by the Commission to use its Title I authority to impose section 254(g)-like requirements on broadband Internet access service would conflict with section 254(e)'s mandate that universal service support be "explicit" and, therefore, would be unlikely to survive judicial review.[38] Alaska and Hawaii both fail to address these fundamental points, and thus there is no rational basis for this Commission to entertain their arguments.

### E. Network Outage Reporting

A few commenters urge the Commission to impose network outage reporting requirements on providers of broadband Internet access service. According to the New Jersey Ratepayer Advocate, network outage reporting requirements are necessary because "consumers need to be able to depend on their access providers."[39] NASUCA similarly asserts that the lack of network outage reporting by broadband Internet access providers "unfairly deprives consumers of the protection they deserve."[40]

While the New Jersey Ratepayer Advocate and NASUCA both attempt to portray network outage reporting as a pro-consumer requirement, neither commenter offers any credible

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[37] AT&T Comments at 15.

[38] AT&T Comments at 16-18 (explaining that section 254(g) is an implicit support mechanism limited to interexchange telecommunications services).

[39] New Jersey Ratepayer Advocate Comments at 12.

[40] NASUCA Comments at 40. Since NARUC "doesn't have a resolution specifically on point," NARUC did not offer any specific support for network outage reporting for broadband Internet access service. NARUC Comments at 14.

explanation of how the act of reporting network outages to this Commission will directly benefit consumers. As AT&T and other commenters explained, providers in the competitive broadband marketplace already have strong incentives to build and maintain highly reliable networks. To the extent a particular provider fails to do so, it can expect to lose customers to a more reliable competitor. Rather than imposing burdensome reporting regulations on a well-functioning marketplace, the Commission should encourage voluntary industry efforts through standards bodies and trade associations to closely monitor network reliability issues and, if necessary, to develop recommendations for furthering the security and reliability of broadband Internet access networks.[41]

### F. Section 214 Discontinuance Procedures

In its comments, AT&T suggested that the Commission may want to consider adopting a limited discontinuance procedure to ensure that, when broadband Internet access providers exit the market, they do so in an orderly fashion that does not cause undue consumer disruption.[42] Some commenters claim, however, that discontinuance requirements are not necessary because, in the competitive broadband market, consumers have other broadband providers to choose from in the event their existing broadband provider discontinues service.[43] While consumers undoubtedly have alternative options for broadband service today, that fact alone does not address the dislocation that can occur when a provider discontinues service to its customers with little or no warning to the customers and with little or no opportunity for a new broadband service provider to ensure a smooth transition for those customers. Indeed, the Commission has

[41] *See* AT&T Comments at 18-19.

[42] AT&T Comments at 19-22 (advocating a streamlined discontinuance procedure akin to the one applicable to non-dominant carriers under section 63.71 of the Commission's rules).

[43] *See* BellSouth Comments at 22-23; Comcast Comments at 16; Time Warner Comments at 12; Verizon Comments at 20-23.

had experience in the past with these same dislocation concerns regarding broadband subscribers.[44] Thus, AT&T continues to believe the Commission should consider adopting a limited, streamlined discontinuance procedure for providers of broadband Internet access service.

### G. Federal-State Partnership

In response to the Commission's questions about how best to harmonize federal and state roles with respect to consumer protection in the broadband marketplace, many commenters (including AT&T) asserted that, to the extent the Commission adopts consumer protection requirements for broadband Internet access service, those requirements must be established as part of a *federal* regulatory framework.[45] At the same time, commenters have acknowledged that the states already play, and should continue to play, an important role in protecting consumers through their state attorneys general who enforce consumer protection statutes of general applicability.[46]

A few commenters, however, have suggested that -- contrary to the Communications Act and decades of precedent -- the role of state commissions should be vastly expanded when it comes to regulating broadband Internet access service for consumer protection purposes. For example, the New Jersey Ratepayer Advocate "urges the Commission to clarify that states have independent authority and concurrent jurisdiction over broadband [Internet access service.]"[47]

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[44] *See NorthPoint Communications, Inc. Application for Permanent Discontinuance of Service Pursuant to Section 63.63*, NSD File No. W-P-D-488, Certificate and Order, DA 01-1234 (released May 23, 2001) (observing that although "NorthPoint believes its customers will be able to find alternative providers of broadband services," the Commission "began receiving numerous informal inquiries by telephone, at about the time that NorthPoint filed its application, from NorthPoint customers – internet service providers (ISPs) concerned about losing service and individual subscribers and ISP customers who in turn would be losing or had already lost service.").

[45] AT&T Comments at 22-23; BellSouth Comments at 24; Cingular Comments at 16-18; CTIA Comments at 4-6; USTelecom Comments at 7-8; Verizon Comments at 25-29.

[46] AT&T Comments at 22-23; CompTel Comments at 17-18; Verizon Comments at 16.

[47] New Jersey Ratepayer Advocate Comments at 14. *See also* NY Commission Comments at 3.

NASUCA, in a rather peculiar argument, compares broadband Internet access service to the "manufacture and sale of illicit drugs" and suggests that, just as local, state and federal prosecutors divide their responsibility for enforcing federal and state drug laws, so too should this Commission and the state commissions divide the enforcement of consumer protection regulations for broadband Internet access service.[48]

Both of these commenters, however, completely ignore section 2 of the Communications Act, in which Congress gave this Commission jurisdiction over "all interstate and foreign communications by wire or radio," while reserving jurisdiction over intrastate communications services to state commissions.[49] Because broadband Internet access service is unquestionably an *interstate* service, state commissions lack the inherent jurisdiction to regulate it.[50] Moreover, allowing 50 different states to adopt their own rules for broadband Internet access service would lead to a patchwork quilt of conflicting regulations that would impede the efficient, nationwide roll-out of broadband services.[51] Neither NASUCA nor the New Jersey Ratepayer Advocate offer any persuasive legal or policy arguments to the contrary and the Commission should therefore reject their claims.

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[48] NASUCA Comments at 45-46.

[49] 47 U.S.C. § 152.

[50] *See GTE Telephone Operating Companies*, CC Docket 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22,466 ¶¶ 1, 26 (1998); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 59 (2002) (*Cable Modem Declaratory Ruling*). *See also* Verizon Comments at 25.

[51] *See Cable Modem Declaratory Ruling* ¶ 97 ("We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries."). *See also Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 ¶ 32 (released Nov. 12, 2004) ("[T]he provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communications and counsels against patchwork regulation.").

### H. Miscellaneous Issues

Aside from addressing the issues specifically enumerated in the *Consumer Broadband Notice*, some commenters have encouraged the Commission to adopt a host of new regulations for the ostensible purpose of protecting consumers in the broadband marketplace. As discussed below, however, these miscellaneous arguments are procedurally improper and/or entirely lacking in substantive merit.

#### 1. Net Neutrality

In the *Wireline Broadband Order*, which accompanied the *Consumer Broadband Notice*, the Commission declared wireline broadband Internet access service to be an information service, which, at long last, placed wireline providers on equal regulatory footing with their cable competitors and set the stage for even greater head-to-head competition in the broadband marketplace.[52] At the same time, the Commission adopted the *Broadband Policy Statement* to "ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."[53] The *Broadband Policy Statement* includes the following four "network neutrality" principles:[54]

- Consumers are entitled to access the lawful Internet content of their choice.
- Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- Consumers are entitled to connect their choice of legal devices that do not harm the network.

[52] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order, FCC 05-150 (released Sept. 23, 2005) (*Wireline Broadband Order*).

[53] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-150 ¶ 4 (released Sept. 23, 2005) (*Broadband Policy Statement*).

[54] *Broadband Policy Statement* ¶ 4.

- Consumers are entitled to competition among network providers, application and service providers, and content providers.

By committing to use these principles "to preserve and promote the vibrant and open character of the Internet," the Commission was able to strike an appropriate balance between establishing regulatory guideposts for the broadband marketplace while not unduly constraining this still-evolving marketplace with unnecessary, prescriptive rules.[55] As Chairman Martin explained, the *Broadband Policy Statement* "reflect[s] core beliefs that each member of this Commission holds regarding how broadband internet access should function. . . . [C]able and telephone companies' practices already track well the internet principles we endorse today. I remain confident that the marketplace will continue to ensure that these principles are maintained."[56]

Some commenters have complained, however, that the *Broadband Policy Statement* does not go far enough. They claim that the only way to truly ensure net neutrality is for the Commission to return to the "good old days" of Title II common carrier regulation and to reimpose the *Computer Inquiry* rules on broadband Internet access service. CompTel, for example, claims that "[t]he answer to the Commission's Notice is actually quite simple: Title II of the Communications Act, as amended, already provides all the consumer protection provisions on which the Commission seeks comment."[57] NASUCA asks the Commission to apply the common carriage requirements and policies embodied in *Hush-a-Phone*, *Carterfone*, the *Open Network Architecture Orders* and *Computer II* to all broadband Internet access providers.[58] In a

[55] *Broadband Policy Statement* ¶ 5.

[56] *Chairman Kevin J. Martin Comments on Commission Policy Statement*, FCC News Release (Aug. 5, 2005).

[57] CompTel Comments at 2.

[58] NASUCA Comments at 9-17.

similar vein, the New Jersey Ratepayer Advocate extols the "substantial social value" of common carrier regulations,[59] and Pac-West claims the Commission's decision to remove those regulations from wireline broadband Internet access service "was erroneous."[60]

At bottom, all of these commenters are effectively asking the Commission to reconsider the deregulatory approach it took in the *Wireline Broadband Order* and to reimpose Title II common carrier regulations on providers of wireline broadband Internet access service. To facilitate this reconsideration, CompTel goes so far as to ask the Commission "to request an immediate voluntary remand" of the *Wireline Broadband Order* from the appeal currently pending in the Third Circuit so that the Commission can "reinstate vital consumer protections."[61] But as CompTel and these other commenters are well aware, petitions for reconsideration of the *Wireline Broadband Order* were required to be filed within 30 days of publication in the Federal Register.[62] Only two parties filed for reconsideration of that *Order*, Verizon and the Arizona Commission, and neither sought the wholesale reversal of the *Order* proposed by commenters here. Accordingly, the Commission should reject the instant commenters' arguments as untimely petitions for reconsideration.

Aside from being procedurally defective, the commenters' arguments are also substantively baseless. The commenters' general theme seems to be that the Commission has overestimated the level of competition in the broadband marketplace, which in their view is at

[59] New Jersey Ratepayer Advocate Comments at 25 (quoting a 1994 paper from Columbia Professor Eli M. Noam).

[60] Pac-West Comments at 1.

[61] CompTel Comments at 5. When read in their entirety, CompTel's comments are strangely inconsistent. On one hand, CompTel lambastes the Commission for deregulating wireline broadband Internet access service, which, according to CompTel, "wiped out the application of statutory provisions that Congress put in place over 75 years ago to protect consumers." CompTel Comments at 3. On the other hand, CompTel asserts that, even without Title II regulation, the Federal Trade Commission, the Department of Justice and the state attorneys general are all very well qualified to address consumer protection matters in the broadband marketplace. CompTel Comments at 14-17.

[62] *See* 47 C.F.R. § 1.429.

best a duopoly, and that *more* regulation, not less, is the only way to ensure that consumers will be adequately protected from anticompetitive, discriminatory conduct by broadband providers. For example, the New Jersey Ratepayer Advocate claims the broadband Internet access market is "a duopoly, which is an extreme form of an oligopoly [that] is only one step away from a monopoly."[63] The Ratepayer Advocate goes on to argue that without additional regulation, "we should expect oligopolistic industries to exhibit a tendency toward the maximization of collective profits, approximating the pricing behavior associated with pure monopoly."[64] Pac-West similarly argues that incumbent wireline broadband providers are "developing and implementing plans to engage in the classic strategy of monopolists and duopolists of increasing revenues by restricting output, in this case in the form of lower speeds."[65] According to Pac-West, "[i]f the last mile broadband market were genuinely competitive, ILECs and cable operators would be competing to provide the fastest speeds, not proposing to artificially restrict output to maximize prices."[66]

As it has rightfully done in the past, the Commission should view these types of arguments with extreme skepticism. In granting a recent broadband-related forbearance petition, the Commission forcefully refuted similar arguments about the alleged lack of competition in the broadband marketplace:[67]

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[63] New Jersey Ratepayer Advocate Comments at 4. *See also* NASUCA Comments at 28 (asserting that the majority of residential and small business customers are limited to a "monopoly, duopoly or cartel" of broadband providers).

[64] New Jersey Ratepayer Advocate Comments at 5 (quoting F.M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Co., at 157 (1970)).

[65] Pac-West Comments at 6.

[66] *Id.*

[67] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, FCC 04-254 ¶29 (released Oct. 27, 2004).

> [W]e specifically reject the assertions of competitive carriers that forbearance should be denied because the BOCs either are not subject to competition with respect to their broadband offerings, or are constrained only by a duopolistic relationship with cable operators. Again, we refuse to take the static view suggested by some competitors of this dynamic broadband market, thus leveling the terms of competition, providing real competitive choice, and furthering the goal of ensuring just, reasonable and nondiscriminatory rates, terms and conditions for these services. As explained above, broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs.

The D.C. Circuit, moreover, "agree[s] with the Commission" that there is "robust intermodal competition" between cable providers and incumbent telephone companies in the provision of broadband services.[68] In fact, the D.C. Circuit concluded that "even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs."[69]

The Supreme Court itself has also sided with the Commission on the issue of broadband competition in the *Brand-X* case. The Court acknowledged that the Commission's "*Computer II* common-carrier treatment" of wireline broadband providers was based on the monopoly "history" of the telephone industry, "rather than on analysis of contemporaneous market conditions."[70] The Court stated that "[u]nlike at the time of *Computer II*, substitute forms of Internet transmission exist today: '[R]esidential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite.'"[71] The Court approved of the Commission's decision to conduct a "fresh analysis" of the broadband

[68] *USTA v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004).

[69] *USTA v. FCC*, 359 F.3d at 582.

[70] *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2711 (2005).

[71] *NCTA v. Brand X Internet Services*, 125 S.Ct. at 2711 (quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 6 (2002)) (second alteration in original).

marketplace in the *Cable Modem Declaratory Ruling* and suggested that a similar review was appropriate for wireline providers as well.[72]

Following the Court's lead, the Commission performed just such a review of the broadband marketplace in the *Wireline Broadband Order*, where it found that "a wide variety of competitive and potentially competitive providers and offerings are emerging in this marketplace . . . such as satellite and wireless, and even broadband over power line in certain locations, indicating that broadband Internet access services in the future will not be limited to cable modem and DSL service."[73] The Commission concluded that "[a]s any provider increases its market share or upgrades its broadband Internet access service, other providers are likely to mount competitive challenges, which will lead to wider deployment of broadband Internet access service, more choices, and better terms."[74]

But if there were still any lingering doubts about the deregulatory course the Commission charted in the *Wireline Broadband Order* and the *Broadband Policy Statement*, the broadband marketplace itself is proving the wisdom of the Commission's decisions. Following those decisions, cable companies and wireline providers have been vigorously competing head-to-head on the speed, features and price of their broadband offerings. In the last six months, both AT&T and Verizon have announced residential broadband Internet access service offerings priced below $15 per month,[75] which is less than the cost of some *dial-up* Internet access plans.[76]

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[72] *NCTA v. Brand X Internet Services*, 125 S.Ct. at 2711.

[73] *Wireline Broadband Order* ¶ 50.

[74] *Wireline Broadband Order* ¶ 61.

[75] *New AT&T Offers Consumers $12.99 Online Promotion for High Speed Internet*, AT&T Press Release (Feb. 3, 2006); *Verizon Offers New, Entry-Level Consumer DSL Service for $14.95 a Month*, Verizon Press Release (Aug. 23, 2005).

During the same period, a host of cable companies, including Comcast, Cox, and Cablevision, announced that they are substantially increasing the speed of their broadband offerings at no additional charge to their customers.[77] In fact, Cox announced just last week that it was *again* increasing broadband speeds for existing customers at no additional charge and was rolling out a new 30 Mbps broadband Internet access service.[78] Not to be outdone, AT&T and Verizon have committed billions of dollars to design and deploy advanced new high-speed, fiber-based networks that will enable "triple-play" competition (voice, video and Internet access) with the cable companies,[79] who, in turn, have been aggressively deploying Voice over IP services to create triple-play offerings of their own.[80]

In light of this robust, head-to-head competition, the Commission should stand firmly by its well-established policy of letting "the marketplace, not the government, pick the winners and losers among new services."[81] Consistent with this policy, the Commission should reject

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[76] *See* AOL with Unlimited Dial-up Plan at http://discover.aol.com/unlimited.adp (offering dial-up service for $25.90 per month); MSN9 Dial-Up at http://join.msn.com/dialup/overview (offering dial-up service for 3 months free and $21.95 per month thereafter).

[77] *Comcast Boosts Modem Speed for Subscribers in Reston*, Washington Post (Feb. 21, 2006); *Cox Gives More Speed to Its Premier High Speed Internet Customers in Select Markets*, Cox News Release (Nov. 30, 2005); *Cablevision Introduces New Optimum Online Speeds for the Next Generation of High-Speed Internet Products*, Cablevision News Release (Nov. 7, 2005).

[78] *Cablevision Fires Back at FIOS*, Multichannel News (Feb. 23, 2006).

[79] *See AT&T Selects 2Wire Residential Gateway for AT&T U-verse*, AT&T Press Release (Dec. 9, 2005) ("Project Lightspeed is the initiative to expand the fiber-optics network deeper into neighborhoods to deliver AT&T U-verse TV, high-speed Internet access and, eventually, Voice over IP services. AT&T companies expect to reach approximately 18 million households by the first half of 2008 as part of initial deployment, using fiber-to-the-node (FTTN) and fiber-to-the-premises technologies."); *Verizon's New High-Fiber 'Diet' for 17 More Pittsburgh Area Communities: Blazing-Fast Data, Crystal-Clear Voice and Video Capability*, Verizon Press Release (Feb. 21, 2006).

[80] *Time Warner Cable Reaches Milestone of 1,000,000 Phone Customers*, Time Warner Cable Press Release (Dec. 5, 2005); *Cox Digital Telephone Goes Live in Las Vegas, Cox Digital Telephone now available to approximately 75 percent of Cox's footprint*, Cox News Release (Nov. 28, 2005); *Comcast Reports Fourth Quarter and Year End 2005 Results*, Comcast Press Release (Feb. 2, 2006) (Comcast expects to add 1 million new Comcast Digital Voice customers in 2006).

[81] *The FCC and the Unregulation of the Internet*, Jason Oxman, FCC Office of Plans and Policy Working Paper No. 31 at 24 (July 1999).

arguments from commenters seeking to reimpose Title II common carrier regulation and the *Computer Inquiry* regime on the broadband marketplace under the guise of "net neutrality."

### 2. Early Termination Fees

In a one-sentence argument, AARP asserts that broadband consumers "should be protected against early termination fees."[82] AARP, however, offers no evidence to suggest that there is any type of market failure with respect to early termination fees. Moreover, AARP also apparently fails to recognize that the ability to charge early termination fees can actually help to *lower* the cost of broadband service for many consumers. When providing a customer with broadband Internet access service, a broadband provider typically incurs significant upfront costs, such as the cost of conditioning a line, supplying the requisite customer premises equipment (e.g., a DSL modem), and, in some cases, dispatching a technician to troubleshoot the installation. Rather than passing these costs directly to customers in the form of upfront charges or higher monthly rates, some broadband providers give customers the option of paying a reduced monthly rate in exchange for committing to purchase service for a fixed period of time (e.g., 6 or 12 months) and agreeing to pay early termination fees. If this option were curtailed or eliminated by the Commission, broadband providers may have no choice but to recover their costs by raising rates – a result that would appear to disserve AARP's own members while conflicting with the Commission's goal of promoting affordable, widely-available broadband service.

### 3. Universal Service

A few commenters encourage the Commission to use the *Consumer Broadband Notice* as a vehicle to decide whether providers of broadband Internet access service should contribute to

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[82] AARP Comments at 5.

the federal universal service fund (USF). Specifically, NASUCA urges the Commission "to go farther in *this* proceeding to ensure a viable universal service fund by requiring all platforms providing broadband service and offering telecommunications-like services to contribute to universal service . . . ."[83] The National Consumer Law Center similarly states that broadband services "should be required to contribute to the USF."[84]

As the Commission has indicated, however, the question of whether broadband Internet access providers should contribute to USF is already pending before it in two other dockets (WC 02-33 and CC 96-45).[85] The Commission has further stated that it expects to address that question "in a comprehensive fashion" in one of those two dockets.[86] There is simply no reason to inject the issue of broadband USF contributions into yet another docket, and the Commission should decline the invitations by NASUCA and the National Consumer Law Center to do so here.

#### 4. VoIP Regulation

The Ohio Commission devotes the bulk of its comments to articulating its views on which regulatory obligations the Commission should impose on providers that offer "VoIP-based telephone service bundled with broadband Internet access."[87] But as the Ohio Commission is no doubt aware, this Commission already has a separate pending proceeding devoted to VoIP and other IP-enabled services. In fact, the Commission's *IP-Enabled Services Notice* sought

[83] NASUCA Comments at 18 (emphasis in original).

[84] NCLC Comments at 11. *See also* DSLnet Comments at 4 (advocating a "platform-neutral" contribution mechanism for USF).

[85] *Wireline Broadband Order* ¶ 112.

[86] *Id.*

[87] Ohio Commission Comments at 3. *See also* 3PV Comments.

comment on the very same types of consumer protection issues raised in the instant *Consumer Broadband Notice*.[88] In response to the *IP-Enabled Services Notice*, interested parties have built a substantial record of nearly 1,200 comments, replies, *ex parte* letters and other filings. Rather than having commenters duplicate those efforts in this docket, the Commission should address consumer protection issues for VoIP in the *IP-Enabled Services* docket.

### 5. Interconnection

Pac-West urges the Commission to adopt a variety of "safeguards" that it claims are necessary to protect broadband consumers.[89] Among other things, Pac-West wants the Commission to establish a series of interconnection-related rules that would: (a) force ILECs to enter into peering arrangements based solely on the number of peering points between the parties, regardless of the amount of traffic exchanged; (b) require ILECs to provide IP backbone interconnection and transit service to non-peering ISPs and CLECs at rates based on long run incremental cost; and (c) regulate the signaling protocols used in IP networks by forcing ILECs to accept all Session Initiation Protocol (SIP) communications without restrictions or limitations.[90]

Despite Pac-West's attempt to couch its proposed safeguards as fostering consumer protection, it is quite obvious that these so-called safeguards have little, if anything, to do with *consumers.* Instead, they are designed to protect Pac-West's *business* interests in negotiating favorable interconnection agreements with ILECs. But matters related to interconnection are

[88] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 ¶¶ 71-72 (released March 10, 2004) (*IP-Enabled Services Notice*).

[89] Pac-West Comments at 2, 6-7.

[90] Pac-West Comments at 7. Pac-West also urges the Commission to "implement binding net neutrality requirements to preclude ILECs from blocking or providing inferior quality access to non-ILEC IP-enabled services." *Id.* AT&T addresses arguments related to net neutrality above in section II.H.1.

clearly beyond the scope of the *Consumer Broadband Notice*. Indeed, the Commission has sought comment on questions related to what interconnection obligations, if any, should exist in an IP-based environment in the *IP-Enabled Services Notice*.[91] Pac-West and numerous other parties have already expressed their views on this issue in that proceeding, and there is no reason for the Commission to address the issue in the *Consumer Broadband* proceeding.

Moreover, even if the Commission were inclined to address interconnection-related issues in this proceeding, Pac-West's proposed regulations are directly contrary to the Commission's well-established policy of Internet "unregulation."[92] Aside from speculation about the "likelihood" of anticompetitive behavior by ILEC providers of broadband Internet access service,[93] Pac-West fails to offer any real-world evidence of a market failure that would justify imposing invasive, economic regulations on the well-functioning commercial relationships that govern Internet backbone services today. Accordingly, consistent with its desire to "avoid regulation based solely on speculation of a potential future problem,"[94] the Commission should reject Pac-West's baseless and transparent attempt to cloak its own business interests in the mantle of consumer protection.

## III. CONCLUSION

Consistent with Congress's directives in the Act, AT&T urges the Commission to rely on market forces, rather than regulation, to ensure that consumers are being well-served in the competitive broadband marketplace. At the same time, however, AT&T encourages the

[91] *IP-Enabled Services Notice* ¶¶ 73-74.

[92] *The FCC and the Unregulation of the Internet* at 24 ("Perhaps the most important contribution to the success of the Internet that the FCC has made has been its consistent treatment of IP-based services as unregulated information services.").

[93] Pac-West Comments at 5.

[94] *The FCC and the Unregulation of the Internet* at 25.

Commission to continue monitoring the broadband marketplace and to take corrective action if consumer concerns arise in the future.

Respectfully Submitted,

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March 1, 2006